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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of:)
)
FLEET CALL, INC. Petition)
for Rule Making)
)
Policies and Rules for)
Licensing Fallow 800 MHz)
Specialized Mobile Radio)
Spectrum Through a)
Competitive Bidding Process)

RM-7985

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FILE

COMMENTS OF TELOCATOR

Telocator, the Personal Communications Industry Association, by its attorneys, respectfully submits its comments in the above-captioned proceeding.¹ As detailed below, Fleet Call's Petition should not be addressed prior to Commission action to eliminate regulatory disparities that preclude full and fair competition between private and common carrier providers of functionally equivalent mobile services. Further, the Fleet Call Petition renews reservations over unresolved public policy issues raised by a competitive bidding process for licensing spectrum.

I. INTRODUCTION AND SUMMARY

Fleet Call asks the Commission to license "innovator blocks" of 800 MHz Specialized Mobile Radio ("SMR") spectrum, in order to "accelerate the construction of advanced, efficient digital SMR

¹ Policies and Rules for Licensing Fallow 800 MHz Specialized Mobile Radio Spectrum Through a Competitive Bidding Process (filed April 22, 1992); See FCC Public Notice, Report No. 1889 (May 11, 1992) ["Petition"].

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systems."² Rather than utilizing existing licensing mechanisms for this purpose, Fleet Call urges the Commission to seek Congressional authority (which it currently lacks) to employ a competitive bidding process.

As Fleet Call concedes, the advanced, digital SMR systems that it seeks to deploy will be functionally equivalent to common carrier cellular service.³ As such, Fleet Call's petition highlights the need to re-evaluate the differential treatment of private and common carrier mobile service providers.⁴ If action on Fleet Call's Petition were taken before grant of Telocator's pending petition to allow cellular carriers the flexibility to offer non-common carrier services,⁵ a fully competitive marketplace offering the widest range of telecommunications options to the American consumer would be severely hampered.

In addition, Telocator renews its reservations concerning the auction process proposed by Fleet Call. Serious, and as yet unresolved concerns are raised by this allocation method. Moreover, public policy considerations and experience overseas

² Petition at i.

³ Id. at 12-13, 19.

⁴ These disparities include state regulation, resale obligations, non-discrimination requirements and foreign ownership restrictions for common carrier services, including cellular, which will be absent from cellular's private radio competitor, advanced digital SMR.

⁵ Amendment of the Commission's Rules to Authorize Cellular Carriers to Offer Auxiliary and Non-Common Carrier Services (filed September 4, 1991); See FCC Public Notice, Report No. 1864 (October 9, 1991) ["Telocator Petition"].

with the use of competitive bidding in the licensing of spectrum suggests that the anticipated benefits of auctions may not be realized.

II. THE ESMR SERVICES ADVANCED BY FLEET CALL'S PETITION WILL REPLICATE CELLULAR SERVICES IN THE SMR BAND WITHOUT ADDRESSING REGULATORY DISPARITIES THAT IMPAIR MARKETPLACE COMPETITION.

A. Fleet Call Intends To Use SMR Frequencies To Replicate Cellular Telecommunications Services.

In Fleet Call's 1990 petition to market ESMR in six cities, the company argued that the new service would differ from cellular in several ways -- most notably, that ESMR would not be a "nationwide interconnected system with 'roaming' ability," and that ESMR end users would need to be licensed.⁶ Since this initial proposal, the scope and nature of ESMR service have grown significantly more ambitious, and the distinctions asserted by Fleet Call have been explicitly overcome.

In the instant pleading, Fleet Call states that its proposed ESMR network will offer "nationwide roaming capabilities"⁷ and "universal coverage"⁸ to SMR users throughout wide regional areas. It also seeks to create "a seamless digital nationwide

⁶ Reply Comments of Fleet Call, Inc., for Authority to Assign SMR Licenses and Waiver of Certain Private Radio Rules, Ref. No. LOMX-90036 (filed July 30, 1990), at 11.

⁷ Petition at 13. In addition, Fleet Call has joined with other SMR licensees to form the Digital Mobile Network Roaming Consortium ("DMNRC"). Id. at 4.

⁸ Id. at 13.

SMR communications network."⁹ These technological advances will allow SMR systems "to offer the capacity, quality, and diverse services demanded by today's users in a competitive wireless communications industry,"¹⁰ and provide "service competitive with other wireless communications providers,"¹¹ most obviously cellular telecommunications service.

At the same time, the Commission has proposed to eliminate the second distinction between ESMR and cellular, end-user licensing.¹² Adoption of this proposal would remove any conceivable "burden" that would limit the attractiveness of ESMR services for cellular subscribers.¹³ It would also, in combination with the instant rulemaking request, represent the final step in the convergence of ESMR and cellular.

⁹ Id. at 5.

¹⁰ Id. at 12-13.

¹¹ Id. at 19.

¹² See Amendment of part 90 of the Commission's Rules to Eliminate Separate Licensing of End Users of Specialized Mobile Radio Systems, PR Docket No. 92-79, FCC 92-172 (May 5, 1992).

¹³ See Reply Comments of Fleet Call, LMK-90036, at 11:

To the extent that ESMR succeeds in attracting customers away from cellular systems, it will not be because they see ESMR as a functional equivalent to cellular They would not ... endure the burden of end user licensing, which is not part of cellular telephone service

B. Significant Regulatory Disparities Exist Between Cellular Telecommunications and Functionally Equivalent ESMR Services.

Cellular carriers are burdened with several regulatory obligations that do not apply to private radio carriers offering similar services. These disparities already impede the ability of cellular carriers to compete with private carriers, and this impediment will only increase if Fleet Call's petition is granted without prior adoption of a more equitable regulatory structure.

A significant factor faced by cellular systems is state regulation. While Section 332(c)(3) of the Communications Act¹⁴ exempts SMRs and other private land mobile radio services from state regulation, it expressly allows states to regulate common carrier mobile providers such as cellular systems. Such regulation raises cellular carriers' costs, limits their pricing flexibility, and hampers their ability to introduce new services and pricing plans that rapidly respond to customer needs.

Moreover, cellular communication systems must comply with requirements imposed by Title II of the Communications Act. They must provide service to all customers upon reasonable request, avoid "unreasonable" discrimination, allow competing carriers to interconnect with their networks, and make their services available for resale.¹⁵ In contrast, the SMR industry is not subject to any of these requirements. "Private" providers of

¹⁴ 47 U.S.C. § 332(c)(3).

¹⁵ See 47 U.S.C. §§ 201-202.

cellular-equivalent services may deny service to less profitable customers, engage in flexible pricing strategies (precluded to common carriers by the non-discrimination requirements of the Communications Act), refuse interconnection to competing carriers, and prohibit resale. These unique freedoms create an imbalance that undermines full and fair competition and, ultimately, harms consumers.

C. The Commission Should Ameliorate These Disparities By Granting Telocator's Flexible Cellular Petition.

Last September, Telocator sought to address the above-mentioned regulatory disparities by filing a Petition for Rulemaking asking that cellular carriers be allowed to offer non-common carrier services on a secondary basis.¹⁶ Telocator proposed to provide greater flexibility for cellular operators to develop new communication technologies by 1) allowing cellular licensees to provide auxiliary non-common carrier services, 2) requiring cellular licensees to guarantee sufficient capacity to meet the needs of common carrier subscribers, 3) forcing non-common carrier services to comply with regulations designed to prevent interference with cellular services, and 4) classifying non-common carrier services as private land mobile radio services for purposes of Section 332 of the Communications Act. In support of its Petition, Telocator showed that advances in

¹⁶ Amendment of the Commission's Rules to Authorize Cellular Carriers to Offer Auxiliary and Non-Common Carrier services, RM-7823, filed September 4, 1991.

cellular technology have stimulated demand for a wider range of products from cellular companies.

Telocator submits that prompt initiation of an NPRM on the Telocator petition is an essential prerequisite to any further action on Fleet Call's request. Adoption of Telocator's proposals would go a long way toward equalizing the regulatory treatment of common carrier and private providers of functionally equivalent services.

III. THE PETITION'S AUCTION PROPOSAL RENEWS SERIOUS AND AS YET UNRESOLVED PUBLIC POLICY CONCERNS.

Fleet Call advocates employment of a competitive bidding process for licensing of spectrum for ESMR services. As the petition concedes, however, Congress has to date prohibited the FCC from allocating private land mobile radio spectrum through auctions or auction-like mechanisms.¹⁷

The proposal renews the unresolved concerns which Telocator, other users and providers of spectrum-based services, and the Congress continue to find with spectrum auctions. As an initial matter, auctions will not necessarily bring service to the public any faster than other allocation mechanisms. Fleet Call recognizes that applicants should be required to demonstrate financial qualifications and show that grant of their applications would be consistent with the public interest.¹⁸ The

¹⁷ Petition at 27.

¹⁸ Id. at 29-30.

Commission's determinations regarding these issues undoubtedly will be challenged, potentially delaying the initiation of service by several years.

In addition, while Fleet Call is correct that auctions would produce a short-term revenue influx, they could well have a negative impact in the longer term. Because of the speculative valuation of mobile radio licenses, some bidders likely will pay excessive amounts for innovator blocks.¹⁹ These substantial up-front costs -- potentially far higher than the costs which licensees would incur in lotteries or even a comparative hearing process -- might be extremely difficult for auction winners to recover in a reasonable period. If revenues are lower than anticipated or companies fail, the long-term tax losses could exceed the initial gain in revenues.

Moreover, the substantial bids necessary to triumph in the auction process -- which Fleet Call estimates would total "hundreds of millions of dollars"²⁰ -- would not only result in large up-front costs. These costs would have to be passed on to the public either as increased service rates or in the form of

¹⁹ Experience with spectrum auctions overseas suggest that many of the theoretical benefits of such practices have no materialized in practice. Where spectrum auctions have been used in foreign markets, valuations have escalated to unrealistic levels. In Australia, for example, auctions for television franchises resulted in absurdly escalating bidding wars. As a result, two Australian networks are now in receivership and the Australian broadcast industry is in ruins. See J. Hughes, "Spectrum Pricing: Speech to World Mobile Communications Conference," Financial Times, Nov. 1, 1991, at 8.

²⁰ Petition at ii.

less expensive, lower quality service with fewer options. In either event, subscribership would suffer.²¹

Indeed, the up-front cost of auctions is a particularly significant issue in the SMR context because the SMR service was created to allow opportunities for small entrepreneurs.²² Obtaining large blocks of SMR channels would require the type of resources enjoyed only by sizable companies. Auctions therefore could freeze out small operators who want to provide the "improved, wide area SMR services" that are necessary "in order to meet the specialized service requirements of private radio customers in the 1990s."²³ They also might significantly impede small operators who want to establish traditional local SMR systems. Finally, auctions could allow foreign companies to own and control domestic communication networks,²⁴ while prohibiting certain major U.S. corporations from participating in the auction process.²⁵

²¹ These effects would be exacerbated because the implementation of Fleet Call's plans admittedly would require substantial capital commitments even aside from the bids. Id. at 18-19.

²² See Land Mobile Services Between 806-960 MHz, 51 F.C.C.2d 945, 956 (1975); H.R. Rep. No. 97-765, 97th Cong., 2d Sess. 53 (1982).

²³ Petition at 11.

²⁴ Although foreign entities are not permitted to control common carriers, they are allowed to own or control private radio licensees. Compare 47 U.S.C. § 310(b) with 47 C.F.R. § 90.115 (1991).

²⁵ See 47 C.F.R. § 90.603(c) (1991).

IV. CONCLUSION

If the Commission ultimately determines that approval of Fleet Call's "innovator block" approach to licensing of SMR frequencies is in the public interest, implementation of this concept must not precede actions, including grant of Telocator's Flexible Cellular petition, to mitigate regulatory disparities that prevent full and fair competition in the mobile services marketplace. Moreover, serious issues remain to be resolved by the Congress prior to the employment of a competitive bidding process for spectrum licensing.

Respectfully submitted,

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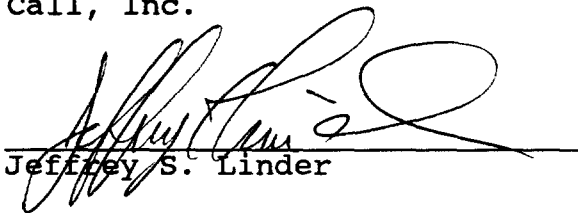
July 17, 1992

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of July, 1992, I caused copies of the foregoing "Comments" to be mailed via first-class postage prepaid mail to the following:

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